

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Part 90 of the Commission's)
 Rules to Facilitate Future Development of)
 SMR Systems in the 800 MHz Frequency Band)

PR Docket No. 93-144
 RM-8117, RM-8030,
 RM-8029

and

Implementation of Section 309(j) of the)
 Communications Act -- Competitive Bidding)
 800 MHz SMR)

PP Docket No. 93-253

To: The Commission

COMMENTS TO FURTHER NOTICE OF PROPOSED RULE MAKING

FRESNO MOBILE RADIO, INC.

Kathleen A. Kaercher
 Brown and Schwaninger
 Suite 650
 1835 K Street, N.W.
 Washington, D.C. 20006
 202/223-8837

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SUMMARY

Fresno is an operator of SMR facilities in Central California and has provided service to the public from its facilities for many years. Fresno finds it particularly galling that its own growth has been hindered while ESMR operators like Nextel have been permitted to warehouse spectrum without any attendant requirement of offering service to the public. Fresno vehemently opposes any further advantage for Nextel and other operators beyond what is presently available in accord with the Commission's current Rules and policies.

The Commission should not be moved to extend further those construction periods due to any MTA based licensing plan. The existing ESMR systems have become frequency warehouses. The delay of service to the public cannot be considered within the public interest, convenience and necessity.

The Commission is attempting to mold an industry into a form which is not necessarily appropriate. Natural market activity is accomplishing, albeit not quite as neatly, what the Commission seeks to do with its MTA scheme.

The Commission has not explained, nor even addressed, how it came to the conclusion that SMR operators, previously thought to require all 280 available channels for adequate development, now need a mere 80 channels. The Commission has before it no evidence to indicate that traditional SMR service, cunningly termed a "niche" service, is on the wane or that it is even faltering. The Commission has not provided a "reasoned analysis" as to why the previously workable structure of regulation is no longer viable.

The Commission has not stated whether existing licensees on the 200 channels which the Commission is considering licensing on an MTA basis would have the opportunity to sell the channels to persons other than the MTA licensee. Nor has the Commission addressed whether the finder's preference program will remain in place with the advent of MTA licensing. The Commission has not addressed how the MTA/BTA licensing scheme would affect previously filed applications, including those currently pending at the Commission. Nor has it addressed how the scheme would affect the applications currently on the Commission's SMR wait list. Any action to implement the MTA/BTA licensing scheme without having resolved these questions would be premature.

The Commission has enumerated four objectives that any rules and policies adopted as a result of the FNPRM must promote. As demonstrated below, the Rules and policies contemplated within the FNPRM will not promote the Commission's four stated objectives, but rather will contravene them. Thus, by the Commission's own terms, it cannot implement the rules or policies discussed in the FNPRM.

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To: The Commission

COMMENTS

Fresno Mobile Radio, Inc. (Fresno) by and through counsel, hereby files Comments in the above-captioned rule making and states its opposition to the proposals put forth by the Commission.

Fresno is an operator of SMR facilities in Central California and has provided service to the public from its facilities for many years. By virtue of its location, Fresno has been forced to accommodate the grandiose plans of ESMR operators like Nextel Communications, Inc. (Nextel), to Fresno's own detriment. Fresno finds it particularly galling that its own growth has been hindered while ESMR operators like Nextel have been permitted to warehouse spectrum without any attendant requirement of offering service to the public.

Fresno reads the Commission's current proposal as a plan to eradicate traditional SMR operators like itself in favor of paper giants like Nextel. Fresno does not herein seek reconsideration of the Commission's earlier grant of Nextel's waiver, however Fresno vehemently opposes any further advantage for Nextel and other operators beyond what is presently available in accord with the Commission's current Rules and policies.

For example, assuming, *arguendo*, that the Commission implements the MTA licensing scheme proposed in the FNPRM, the Commission then proposes to extend the construction periods of previously licensed stations for the winning MTA operator. Fresno opposes this plan. The Commission's benevolent grant of five-year construction periods for the build out of ESMR systems has not been met by its recipients with any diligent effort to, in fact, construct and operate such systems. Indeed, it appears that most of the spectrum granted by the Commission within the last three-year period to ESMR operators remains fallow, the repeaters still unconstructed, and the attendant service still in the proposal stage. Given this obvious history, the Commission should not be moved to extend further those construction periods due to any MTA based licensing plan. The existing ESMR systems have become frequency warehouses. To allow companies to pay five years' additional rent for warehouse space via auction is wholly contrary to the Commission's mandate to encourage actual delivery of service to the public in a timely, rational manner. The delay of service to the public cannot be considered within the public interest, convenience and necessity.

Perhaps a new glossary of terms in the lexicon of telecommunications regulation is necessary to describe the ESMR experiment. It is apparent that, for example, Nextel's experience includes not only warehousing of spectrum, but constant redevelopment, tinkering, software changes, revamped frequency use plans, and the like, making one wonder whether the company is run by Rube Goldberg or the Denver airport designers. To date, it is well acknowledged that Nextel's system is still incapable of delivering a viable service to the public which even remotely delivers the promises contained in the company's original request for waiver that created ESMR in the first instance. Its business strategy contains missed opportunities, broken promises, and the same confidence from financial markets that McGovern exhibited for Eagleton. Like the legendary Goldberg, this combination of events and mishaps might be amusing, but the adverse results of this failed experience have been visited upon traditional SMR operators, the Commission, and, most regrettably, the public.

The Commission has already tacitly approved delays in the delivery of ESMR service to the public by up to approximately five years; less time if the operator constructs early. Nextel, despite having been blessed with such largesse by the Commission, has spent more of its efforts and resources on purchasing other ESMR operators than constructing a viable system. Indeed, initial reports indicate that the system(s) Nextel has constructed does not work as anticipated or as promised. Nor has any other ESMR operator constructed a viable, working system. Rather than revamp its

entire regulatory scheme in favor of unproven technology, the Commission should wait and see if the public is really behind ESMR technology.

Let the Market Decide

The Commission is attempting to mold an industry into a form which is not necessarily appropriate. In the first instance, the market has shown a tendency, on its own, to form larger companies and consolidate licenses into the hands of fewer entities. That the Commission should halt such growth and force the market into the Commission's own pattern is impractical and unnecessary.

Numerous small entities have sold their stations to larger operators, or have joined into regional groups to offer a wide-area service through roaming agreements. Such natural market activity is accomplishing, albeit not quite as neatly, what the Commission seeks to do with its MTA scheme. One must ask why the Commission feels it necessary to head off and foil what appears to be happening naturally; particularly when it is apparent that almost every single small operator would be detrimentally affected by the Commission's move, but virtually unaffected or benefitted by the natural market development of the industry sans further government interference.

Add to the equation that the Commission will spend extreme amounts of its scarce resources to forward this universally detested agenda, and the small operator begins to wonder if all the screaming in the world will alert the engineer at the helm of the

oncoming train that all of the small SMR operators stand squarely in the path of the train as it hurtles toward them on its path to their destruction.

It is ironic that the Commission has recognized that:

today's stand-alone SMR operator could be the cornerstone of tomorrow's wide area system, which may have a design and structure either similar to or different from current wide-area systems. We are concerned that the natural evolution of the service not be hampered by organized implementation of a wide-area licensing scheme, but also that it does not operate to defeat the goals that motivate today's proposal.

Further Notice of Proposed Rulemaking, ¶18.

What Happened?

The Commission has not explained, nor even addressed, how it came to the conclusion that SMR operators, previously thought to require all 280 available channels for adequate development, now need a mere 80 channels. The industry which will be affected by the Commission's action has a right to know what evidence the Commission evaluated which led it to conclude that 80 channels are sufficient for SMR use. The Commission has before it no evidence to indicate that traditional SMR service, cunningly termed a "niche" service, is on the wane or that it is even faltering. It has no evidence that the public is clamoring for ESMR service. It has no evidence that SMR service cannot or will not evolve to serve wider areas, when necessary.

The Commission has not provided a "reasoned analysis" as to why the previously workable structure of regulation is no longer viable. "[A]n agency changing its course

by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Manufacturers Association of the United States, Inc., et al v. State Farm Automobile Insurance Co., 463 U.S. 29, 42 (1983) ("Motor Vehicle). In the instant situation, the Commission is changing its entire regulatory scheme regarding 800 MHz; such a change requires greater explanation than a mere rule change.

In the spirit of Motor Vehicle, the Commission must provide evidence of reasoned decision making, illuminating the facts upon which it relies. For example, what facts were employed to decide that traditional SMR operators were providing a "niche" service, considering that the service referred to, dispatch, is demanded by more members of the public than almost any other land mobile service? What evidence caused the Commission to conclude that traditional SMR operators had no desire to grow and expand into the provision of wide area service? Given the effects of the Commission's proposals, such a foregone conclusion by the agency appears to be guiding its hand. What evidence was employed to conclude that local operators would be incapable or unwilling to deliver services employing digital technology, frequency reuse, and fully integrated systems? Fresno knows of no such unwillingness in traditional operators.

In sum, Motor Vehicle creates a requirement that the agency make its case and then employ its expertise and discretion. In the instant matter, it appears that the Commission has not yet made its case. It has not provided the *prima facie* evidence

required to allow it to alter dramatically its regulatory scheme. Instead, it has merely piled supposition upon conclusion to lead it toward a predetermined course that is without factual basis and which is contrary to the public interest.

The Devil is in the Details

The Commission has not stated whether existing licensees on the 200 channels which the Commission is considering licensing on an MTA basis would have the opportunity to sell the channels to persons other than the MTA licensee. Nor has the Commission addressed whether the finder's preference program will remain in place with the advent of MTA licensing.

No matter what course the Commission might choose regarding MTA licensing, it is imperative that traditional operators not be placed at the mercy of others in future negotiations regarding sales of systems. For example, if the Commission were to adopt MTA licensing, any restriction on sales of existing systems which would require sale to an MTA licensee would place the traditional licensee at a distinct disadvantage. This arbitrary reduction in the value of systems by creating a legislative "option to purchase" would create an unequal playing field, with no concurrent benefit to the traditional carrier. Such fundamental unfairness must be avoided and eschewed by the Commission as anathema to its mandate to promote the vitality of small businesses. Fresno respectfully requests that the Commission not devalue its systems by earmarking them for sale at unfavorable prices.

Fresno also believes that the Commission should retain the finder's preference program, and include those stations licensed to the MTA operator prior to the adoption of MTA licensing. The finder's preference program will provide the only opportunity for SMR operators to gain additional channels after the adoption of MTA licensing. If the MTA licensee were subject to the same Finder's Preference threat as other licensees (after the end of the initial, non-increased construction period), the MTA licensee would have an incentive to timely construct and operate and offer service to the public.

The Commission has not addressed how the MTA/BTA licensing scheme would affect previously filed applications, including those currently pending at the Commission. Nor has it addressed how the scheme would affect the applications currently on the Commission's SMR wait list. Any action to implement the MTA/BTA licensing scheme without having resolved these questions would be premature.

The Commission Fails its Own Test

The Commission has enumerated four objectives that any rules and policies adopted as a result of the FNPRM must promote. As demonstrated below, the rules and policies contemplated within the FNPRM will not promote the Commission's four stated objectives, but rather will contravene them. Thus, by the Commission's own terms, it cannot implement the rules or policies discussed in the FNPRM. The Commission's stated objectives are:

1. Providing opportunities for 800 MHz SMR system operators in all areas of the country to develop wide-area systems while also protecting the viability of smaller systems.

If the Commission were to implement its MTA licensing scheme as outlined in the FNPRM, the Commission would sound the death knell for smaller systems. It would prevent, to a great extent, the licensing of new, small, systems and would prevent the growth of existing small systems. As for providing for wide area systems, the Commission did that when it granted the Fleet Call rule waiver. What is needed is not re-regulation by the Commission, but rededication by ESMR operators to deliver their promised service.

2. Ensuring that all SMR licensees make productive use of the spectrum by constructing and implementing their systems promptly.

The Commission has taken steps to ensure that SMR licensees construct and implement systems promptly. That was the impetus of the finder's preference program, which has been embraced by the industry, and which has resulted in the reassignment of frequencies to deserving parties. The Commission also has its 800A letter, which it sends to licensees, requesting information on system construction and operation. If the Commission's 800A letter system is not working to ensure that SMR systems are constructed and operating¹, there are far less drastic measures available to rectify the problem, that do not involve the re-organization of an entire industry.

¹ The Commission has never stated that its 800A letter system is ineffective.

The Commission has not addressed the problem of prompt construction and operation of SMR systems in this FNPRM. It begs credulity to believe that the Commission can ensure the prompt construction and implementation of SMR systems by merely changing the definition of "prompt". It appears that the Commission reasoned, "If we give people five years to construct, then they will certainly construct on time." The Commission has not justified its willingness to grant ESMR operators winning the MTA licenses an *extra* five years to construct that for which they had previously obtained a license, considering the agency's stated position that one of its goals is to "ensure that SMR licensees construct and implement systems promptly." Unless, of course, the Commission intended that its stated objective did not include ESMR operations.

3. Encouraging more efficient use of SMR spectrum, particularly in congested areas, through development of technologically advanced systems supporting enhanced services, such as seamless wide area roaming and high speed data transmission.

The Commission has not found that the current use of spectrum by analog SMR operators is an inefficient use of spectrum. Current SMR operators have applied for and are using spectrum in accord with Commission Rules. Without facts justifying the Commission's apparent determination that what previously had been deemed an efficient use of spectrum no longer is such, the Commission's actions to force MTA licensing are arbitrary and capricious, see, Motor Vehicle Manufacturers Association of the United States, Inc., et al v. State Farm Automobile Insurance Co., 463 U.S. 29 (1983). Furthermore, as stated previously, market forces are currently at work to encourage the growth of wide area roaming. If there is a market for enhanced services and high speed

data transmission, the services will be forthcoming. They might not necessarily come from the 800 MHz band spectrum, new licensees in the 220 MHz band might fulfill the void, if there is one. Or PCS might take up the banner. Regardless, the telecommunications industry has always been well equipped to match service to demand and the market will be served without Commission assistance or interference.

4. Removing any unnecessary regulatory burdens that hamper the efforts of 800 MHz SMRs to compete effectively with other CMRS offerings.

Enabling SMR operators to compete with other CMRS offerings is a laudable goal. Indeed, SMR operators now compete with UHF community repeater operators, private carrier two-way systems, radio common carrier two-way systems, and cellular systems. In fact, in many instances, SMR operators are not only competing, they're winning. A careful review of the traditional SMR marketplace demonstrates that it has produced commendable growth in the delivery of trunked dispatch services to a large segment of the public. The introduction of cellular service to markets still did not deter the growth of the SMR marketplace and the advent of PCS services will also not alter the path to success enjoyed by many operators.

The reasons for this success are many, but perhaps the most important is a recognition by SMR operators that its service is the provision of reliable, cost efficient dispatch services. This is the market and traditional SMR operators serve that market as well, if not better, than any other operators in the industry. Unaffected by the hubris of ESMR, the traditional operator gives the public what it demands. The traditional

operator does not listen to the whines of Wall Street or the vulgar noises emitted by every new bell or whistle. It provides a basic service, at a fair price, employing reliable technology. And the public thanks those operators every day.


If the Commission is truly sincere in its efforts to assist the competitiveness of SMR operators, then the Commission should recognize that the vitality of this industry is not in the flurry of security transactions, financial predictions, and the frenzied cry of "third cellular system". The vitality of the SMR industry is found in the efforts of traditional SMR operators who toil daily to provide services to a grateful and demanding public. The Commission's proposals do not reward these SMR pioneers and yeomen. They penalize those same operators and retard their opportunities and earned privileges. Fresno respectfully requests that these proposals be rejected summarily as contrary to the interests of those that have created the industry and deserve better for their labor.

Conclusion

For all the foregoing reasons, Fresno Mobile Radio, Inc. respectfully requests that the Commission reject the proposals contained in the FNPRM as contrary to the interests of traditional SMR operators.

Respectfully submitted,
FRESNO MOBILE RADIO, INC.

By


Kathleen A. Kaercher

Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, D.C. 20006
202/223-8837

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